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Konvalin v. Sigler, No. 19,731, United States Court of Appeals for the Eighth Circuit 5, 7

State v. Raymond, —— N. J. Super. —— (1971), No. A-954-69, decided February 2, 1971 6

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 6382

HERBERT HENRY McCLARY, Petitioner,

vs.

STATE OF NEW JERSEY, Respondent.

On Petition for Writ of Certiorari to the Supreme Court of New Jersey

BRIEF IN OPPOSITION

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

The Respondent, The State of New Jersey, answering the Petitioner's Petition for a Writ of *Certiorari* to the Supreme Court of New Jersey, respectfully shows:

I.

Reference to official reports of opinions delivered in the courts below.

The order of the Supreme Court of New Jersey, denying the petition for certification to that court, for the convenience of this court, is annexed hereto.

The opinion of the Superior Court of New Jersey, Appellate Division, referred to in Petitioner's petition as Exhibit (11), but not annexed to the brief served upon the Respondent, for the convenience of this court, is annexed hereto.

The State's brief filed in the Superior Court of New Jersey, Appellate Division, is also available to this court if this court desires it to be filed.

II.

Counter-statement concerning jurisdiction.

As Counsel for Petitioner states in the petition, jurisdiction in this court is invoked under 28 U.S.C., Sec. 1257 (3), alleging deprivation of rights secured by the Constitution of the United States, it is respectfully submitted that the Supreme Court of New Jersey did not decide any federal questions of substance not heretofore determined by this court or contrary to the applicable decisions of this court.

The State here concedes that if this court has jurisdiction it must be invoked and authorized by 28 U.S.C., Sec. 1257(3).

We respectfully submit, however, that no title, right, privilege or immunity was determined below, in the Ap-

pellate Division of the Superior Court of New Jersey, nor did it decide any federal question of substance not heretofore determined by this court, or contrary to the applicable decisions of this court.

We therefore respectfully submit that this court should not entertain jurisdiction and issue it's writ of *certiorari* to review the decision of the court below.

As to Petitioner's Action in the Federal Courts Below

The action taken by Petitioner in the United States District Court for the District of New Jersey (See copy of its opinion and order annexed hereto) and the action of the United States Court of Appeals Third Circuit (See order annexed hereto) were on matters of procedure and the United States District Court for the District of New Jersey dismissed petitioner's application as prematurely made under 28 U.S.C. § 2254.

The decisions of these two courts are not before this court in any way and have no relevance on this petition.

As to the Alleged Excessive Sentences

The Appellate Division's opinion states, on Petitioner's appeal to it:

> "The sentences were well within the statutory limits; despite defendant's claim we do not find them 'manifestly excessive.' There is no merit in his further argument that the failure to assign counsel to represent him at the preliminary hearing amounted to a denial of due process. Not only did he waive preliminary hearing but *State* v. *Kirkland*, 82 N. J. Super. 409 (App. Div. 1964), is to the contrary."

Counter-Statement of Facts

The pertinent facts of this case may be summarized as follows:

Petitioner's conviction rests upon a plea of guilty to charges of petit larceny and unlawful possession of a weapon. For these offenses, both misdemeanors at the time committed, petitioner received consecutive sentences of one to two years in New Jersey State Prison. The cause was originally heard on complaints in New Brunswick Municipal Court, where petitioner waived his right to preliminary examination. The case subsequently went to the Grand Jury which returned indictments. Thus, the petitioner eventually found himself in County Court where his plea was taken and where the judgments of conviction were entered.

POINT I

The failure to assign counsel at defendant's arraignment was not a denial of due process.

Defendant, in effect, pleaded guilty to two misdemeanors. The maximum sentence on both would have been six years imprisonment and a fine of $2,000.00. (N.J.S. 2A:85-7). He received a sentence of one to two years on each conviction to run consecutively to each other and to a prior conviction in Mercer County.

Defendant first contends the events in question constitute a single criminal offense. Defendant was caught at Rutgers University by students after breaking and entering a dormitory room and removing certain articles. Thereafter, he pulled a loaded gun from his car, which one of the students took away from him. The events are

unrelated. Defendant never used the gun in the breaking and entering. In that sense the sentences were not excessive.

Defendant next asserts had he been represented by counsel in the Municipal Court of New Brunswick, the complaint charging "grand" larceny would have been reduced to "petit" larceny and his maximum sentence, or term would have been a workhouse term. The defendant ignores several facts. In addition to the charge of larceny in the municipal court, there were also pending complaints for a violation of N.J.S. 2A:94-1, breaking and entering, and also N.J.S. 2A:151-4(a), illegal possession of a weapon. Defendant waived a preliminary hearing and indicated he would obtain counsel. He never asked for a continuance. Moreover, he fails to recognize the local judge must concur in the reduction of the charge he complains of. That was highly unlikely where the other charges were pending. Defendant suffered no prejudice.

The controlling case of this court is *Coleman* v. *Alabama*, 399 U. S. 1, 90 S. Ct. 1999, 26 L. Ed. 2d 387 (1970), where the assistance of counsel was mandated at a preliminary hearing, and decided in this court on June 22, 1970, on a state of facts and proceedure very different from ours, even though *Coleman* does extend the earlier holdings of this court as to "critical stages" of criminal prosecutions. In our case, there was a guilty plea and *Coleman* is not cited or relied upon by Petitioner here.

The criminal acts charged in our indictment took place long before the decision in *Coleman* and the conviction of our petitioner took place on March 20, 1969.

On September 22, 1970, United States Court of Appeals for the Eighth Circuit, No. 19,731, in *Konvalin* v. *Sigler*, decided that the holdings in *Coleman* were not retroactive. This alone should dispose of Petitioner's contention here.

Having pleaded guilty to the downgraded offense of larceny under $200.00, and having had the first count dismissed, no substantial federal question appears here.

But regardless of whether *Coleman* be held retroactive or prospective the consequences of a guilty plea have recently been examined in *State* v. *Raymond* N. J. Super. (1971) No. A-954-69, decided February 2, 1971, in the light of the decisions of this court as follows:

> "The consequences of a guilty plea have been examined in a number of recent United States Supreme Court cases. Such a plea is in itself considered a conviction, and several federal constitutional rights are waived when the plea is entered, e.g., the privilege against self-incrimination, the right to trial by jury, the right of confrontation. *Boykin* v. *Alabama*, 395 U. S. 238, 243 (1969). Of course, the plea must be voluntary and made with a full understanding of its consequences. *Brady* v. *United States*, 397 U.S. 742, 90 S. Ct. 1463, 1463-1469, 25 L. Ed. 2d 747 (1970); *McMann* v. *Richardson*, 397 U.S. 759, 90 S. Ct. 1441, 1449, 25 L. Ed. 2d 763 (1970); *State* v. *Herman*, 47 N. J. 72, 76-77 (1966).
>
> "Our reading of the transcript of the plea convinces us that defendant voluntarily retracted his plea of not guilty to the conspiracy indictment and pleaded guilty, well understanding the consequences of so doing. At that moment he knew that the trial court had denied his motion to dismiss as well as his motion to suppress, and therefore understood his legal position. By pleading guilty he waived any of the constitutional rights he now claims."

Konvalin v. *Sigler, supra,* arose after a jury trial; he did not plead guilty as did our defendant here; the court there said:

> "The Supreme Court has not directly passed on the retroactivity of the assistance of counsel in this situation. In *Wetzel* v. *North Carolina,* 399 U.S. 934 (1970), the identical question was before the Supreme Court and the petition for writ of certiorari was denied. Mr. Justice Black, Mr. Justice Douglas and Mr. Justice Harlan dissented, citing *Coleman* v. *Alabama, supra,* and their dissenting opinions in *Desist* v. *United States,* 394 U.S. 244, 255, 256 (1969). We review the question of retroactivity dependent upon the principles applied in *Desist* v. *United States, supra.* See also *Jenkins* v. *Delaware,* 394 U.S. 213 (1969).
>
> "The Supreme Court in *Desist* reiterated the principles relating to retroactivity summarized in *Stovall* v. *Denno,* 388 U.S. 293, 297 (1967):
>
> > '(a) [T]he purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards.'
>
> "The Court pointed out that foremost among these factors is the purpose to be served by the new constitutional rule."

POINT II

The amending of the indictment did not constitute error prejudicial to this petitioner.

The indictment was amended to reduce the alleged value of the goods stolen and the effect of this reduction reduced the grade of this offense and the punishment thereof from a high misdemeanor to a misdemeanor. Its effect in every way was beneficial to petitioner and probably induced his plea of guilty.

The Appellate Division found "frivolous his contention that the prosecutor's failure to disclose evidence allegedly in his favor—specifically that the value of the stolen property was less than $200—was an act of bad faith and should have resulted in a dismissal of the petty larceny charge."

POINT III

The alleged ineffective counsel point is frivolous.

This point is clearly not before this court on this petition.

CONCLUSION

Petitioner's effort to bring the case at bar within the scope of review by this Court is actually without merit.

We submit that no substantial federal question meriting review by this Court has been raised in this case; for this reason and for the other reasons hereinbefore set forth, it is respectfully submitted that this petition of *Herbert Henry McClary* for a writ of certiorari be denied and dismissed.

Respectfully submitted,

CLIFTON E. CRONIN,
Deputy Attorney General in Charge
Attorney for and of Counsel with Respondent, State of New Jersey,
County Administration Building,
New Brunswick, New Jersey.

WILLIAM D. DANBERRY,
Assistant Deputy Attorney,
Of Counsel and on the Brief.

[APPENDIX FOLLOWS]

APPENDIX A

Order of Supreme Court of New Jersey Denying Petition for Certification

SUPREME COURT OF NEW JERSEY

C-46 SEPTEMBER TERM 1970

STATE OF NEW JERSEY,

Plaintiff-Respondent,

vs.

HERBERT HENRY McCLARY,

Defendant-Petitioner.

To Appellate Division, Superior Court:

A petition for certification having been submitted to this Court, and the Court having considered the same,

It is hereupon Ordered that the petition for certification is denied.

WITNESS the Honorable Joseph Weintraub, Chief Justice, at Trenton on the 7th day of October, 1970.

JOHN H. GILDEA
Clerk of the Supreme Court

APPENDIX B

Per Curiam Opinion of the Superior Court of New Jersey, Appellate Division

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

A-1904-68

STATE OF NEW JERSEY,

Plaintiff-Respondent,

vs.

HERBERT HENRY McCLARY,

Defendant-Appellant.

Argued May 4, 1970—Decided May 11, 1970.

Before JUDGES GOLDMANN, LEWIS and MATTHEWS.

On appeal from the Middlesex County Court.

MR. NORMAN L. KLINE, Assistant Deputy Public Defender, argued the cause for appellant (MR. STANLEY C. VAN NESS, Public Defender, attorney).

MR. DAVID MONYEK, Assistant Prosecutor, argued the cause for respondent (MR. EDWARD J. DOLAN, Middlesex County Prosecutor, attorney; MR. CHRISTOPHER R. WOOD, Assistant Prosecutor, on the brief).

Appendix B

PER CURIAM

Defendant appeals through the Public Defender from judgments of conviction entered on guilty pleas to charges of petty larceny and possession of a loaded weapon without having a permit. All the arguments are presented at defendant's request.

The original indictments were (1) a two-count indictment charging defendant with larceny of over $200 and receiving the same goods (N.J.S.A. 2A:119-2 and 2A:139-1), and (2) possession of a loaded weapon without a permit (N.J.S.A. 2A:151-41(a)). While awaiting trial he answered a criminal charge in the Mercer County Court, pleaded guilty, and was sentenced to a workhouse term of one year, with credit for time spent in the county jail from September 24 on. After being returned to Middlesex County he pleaded not guilty to all counts of the Middlesex County indictments on January 6, 1969. However, on March 20 he retracted the pleas and pleaded guilty to petty larceny and the possession of the weapon, the first count of the first mentioned indictment being amended to larceny of goods having a value of less than $200. The second count of that indictment was dismissed on the State's motion.

Defendant was sentenced on May 5, 1969 to consecutive State Prison terms of 1-2 years on the petty larceny and possession of weapon charges.

The sentences were well within the statutory limits; despite defendant's claim we do not find them "manifestly excessive." There is no merit in his further argument that the failure to assign counsel to represent him at the preliminary hearing amounted to a denial of due process. Not only did he waive preliminary hearing but *State* v.

Appendix B

Kirkland, 82 N. J. Super. 409 (App. Div. 1964), is to the contrary. Finally, we find frivolous his contention that the prosecutor's failure to disclose evidence allegedly in his favor—specifically that the value of the stolen property was less than $200—was an act of bad faith and should have resulted in a dismissal of the petty larceny charge.

Affirmed.

APPENDIX C

Order of the United States Court of Appeals for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

C. A. MISC. REC. No. 1410

UNITED STATES OF AMERICA
ex rel. HERBERT HENRY MCCLARY

Appellant,

vs.

THE STATE OF NEW JERSEY

(D. C. Civil No. 1216-69)

Present: BIGGS, ALDISERT and STAHL, *Circuit Judges.*

Upon consideration of petitioner's application for certificate of probable cause in the above-entitled case,

It is ORDERED that petitioner's application for certificate of probable cause be, and hereby is denied.

By the Court,

BIGGS
Circuit Judge

Dated: January 20, 1970

APPENDIX D

Opinion and Order of the United States District Court for the District of New Jersey

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CIVIL ACTION No. 1216-69

UNITED STATES OF AMERICA
ex rel. HERBERT HENRY McCLARY

vs.

STATE OF NEW JERSEY

COOLAHAN, District Judge:

This is an application by a state prisoner for a writ of habeas corpus. Because it appears, from a letter of the Public Defender's Office marked Court Exhibit 1, that petitioner's sentence is now on direct appeal in the State Courts of New Jersey, this application should be dismissed as premature under 28 U.S.C. §2254. Petitioner's motion for appointment of counsel should, therefore, be denied.

Therefore, it is, on this 23rd day of October, 1969, ORDERED that the application of petitioner Herbert Henry McClary be and is hereby dismissed without prejudice. The court finds that there is no probable cause for appeal.

JAMES A. COOLAHAN
United States District Judge

APPENDIX E

Indictment No. 246-68

NEW JERSEY SUPERIOR COURT
MIDDLESEX COUNTY

LAW DIVISION

(CRIMINAL)

Nos. 68-1330
68-1350

Sept. 1968 Stated Session

September Term 1968

THE STATE OF NEW JERSEY

vs.

HERBERT McCLARY,

Defendant.

THE GRAND JURORS of the State of New Jersey, for the County of Middlesex, upon their oaths, PRESENT THAT HERBERT McCLARY, on the 24th day of September, 1968, in the City of New Brunswick, in the County of Middlesex aforesaid, and within the jurisdiction of this Court, unlawfully and feloniously did steal, take and carry away,

Appendix E

1—Royal typewriter, of the value of $150.00; 1—Garrard Stereo, of the value of $105.00, and 1—Pair of Headphones, of the value of $35.00,

in all of the value of $290.00, of the property, goods and chattels of Mark Sorin then and there being found, contrary to the provisions of N.J.S. 2A:119-2, and against the peace of this State, the Government and dignity of the same.

SECOND COUNT

AND THE GRAND JURORS aforesaid, upon their oaths aforesaid, do further PRESENT that the said HERBERT McCLARY, at the time and place aforesaid, and within the jurisdiction of this Court, unlawfully and feloniously did receive and have,

1—I.B.M. Typewriter,

of the property, goods and chattels of St. Joseph's College, a Corporation of Pennsylvania, before then feloniously stolen, taken and carried away, he the said HERBERT McCLARY well knowing the same to have been feloniously stolen, taken and carried away, contrary to the provisions of N.J.S. 2A:139-1, and against the peace of this State, the Government and dignity of the same.

A True Bill:

ROBERT D. ARNOLD
Robert D. Arnold
Foreman.

EDWARD J. DOLAN
Edward J. Dolan
County Prosecutor
by: WILLIAM D. DANBERRY
Assistant Prosecutor

Appendix E

Judgment

NEW JERSEY SUPERIOR COURT
MIDDLESEX COUNTY
LAW DIVISION
(CRIMINAL)

Indictment No. I-246-68

THE STATE OF NEW JERSEY

vs.

HERBERT MCCLARY,

Defendant.

The defendant on the 6th day of January, 1969 having entered a plea of not guilty to both counts of Indictment No. I-246-68 for the crime of larceny and receiving stolen property; and the defendant having on the 20th day of March, 1969 retracted plea of Not Guilty and entered a plea of Guilty to the first count of larceny under $200;

It is, therefore, on this 5th day of May, 1969

Ordered and Adjudged that the defendant be and is sentenced to the New Jersey State Prison for a term of not less than one year nor more than two years, said sentence to run consecutively to the sentence imposed in I-247-68 and consecutively to the term to be completed in the Mer-

Appendix E

cer County Workhouse. The defendant is to receive credit for time spent incarcerated for a total of 69 days. The second count of said indictment be and the same is hereby dismissed on motion by the state.

Entered

FRANK SCHATZMAN
Clerk

JOHN B. MOLINEUX
Judge

Date: May 5, 1969

Appendix E

Indictment No. 247-68

NEW JERSEY SUPERIOR COURT
MIDDLESEX COUNTY
LAW DIVISION
(CRIMINAL)
File No. 68-1331
Sept. 1968 Stated Session
September Term 1968

THE STATE OF NEW JERSEY

vs.

HERBERT McCLARY,

Defendant.

THE GRAND JURORS of the State of New Jersey, for the County of Middlesex, upon their oaths, PRESENT THAT HERBERT McCLARY, on the 24th day of September, 1968, in the City of New Brunswick in the County of Middlesex aforesaid, and within the jurisdiction of this Court, unlawfully carried and had in his possession a loaded 32-20 caliber revolver (Winchester), Serial No. 11488, without first having obtained the requisite permit to carry the same, the said firearm being then and there possessed and car-

ried by the said Herbert McClary, contrary to the provisions of N.J.S. 2A:151-41(a), and against the peace of this State, the Government and dignity of the same.

A True Bill:

ROBERT D. ARNOLD
Robert D. Arnold
Foreman.

EDWARD J. DOLAN
Edward J. Dolan
County Prosecutor
By: WILLIAM D. DANBERRY
Assistant Prosecutor

Appendix E

Judgment

NEW JERSEY SUPERIOR COURT
MIDDLESEX COUNTY
LAW DIVISION
(CRIMINAL)
Indictment No. I-247-68

THE STATE OF NEW JERSEY

vs.

HERBERT McCLARY,

Defendant.

The defendant on the 6th day of January, 1969 having entered a plea of not guilty to Indictment No. I-247-68 for the crime of illegal possession of a weapon; and the defendant having on the 20th day of March, 1969 retracted plea of Not Guilty and entered plea of Guilty,

It is, therefore, on this 5th day of May, 1969

Ordered and Adjudged that the defendant be and is sentenced to the New Jersey State Prison for a term of not less than one year nor more than two years, said sentence to run consecutively to the sentence imposed in I-246-68 and to run consecutively to the term to be com-

pleted at the Mercer County Workhouse. The defendant is to receive credit for time spent incarcerated for a total of 69 days.

Entered

FRANK SCHATZMAN
Clerk

Date: May 5, 1969

JOHN B. MOLINEUX
Judge